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No. 93-892

In the Supreme Court of the United States

OCTOBER TERM, 1993

NTA GRAPHICS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion when it concluded that petitioner's pressroom employees constitute an appropriate bargaining unit under Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A4) is unreported, but the judgment is noted at 996 F.2d 1216 (Table). The decision of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. A5-A12) is noted at 307 N.L.R.B. No. 224 (1992). The Regional Director's decision and direction of election in the underlying representation proceeding (Pet. App. A15-A28), and the Board's order denying petitioner's request for review of that decision (Pet. App. A13-A14), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1993. A petition for rehearing was denied on August 23, 1993. On November 15, 1993, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 6, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner produces newspaper advertising inserts at its high-volume lithographic printing facility in Toledo, Ohio. Pet. App. A2, A7. In June 1987, the Union[1] filed a representation petition with the National Labor Relations Board (Board) seeking (as later amended) to represent a bargaining unit of petitioner's approximately 40 pressroom employees. Gov't C.A. Br. 3; Pet. App. A15, A19. Petitioner objected to the unit proposed by the Union, urging instead that the bargaining unit should consist of all production and maintenance employees. *Id.* at A19.

In August 1987, after a hearing, the Board's Regional Director concluded that "the press room employees herein possess a separate and distinct community of employment interests and * * * a unit composed exclusively of them constitutes a unit appropriate for purposes of collective bargaining" under Section 9(b) of the National Labor Relations Act (Act), 29 U.S.C. 159(b).[2] Pet. App. A27; see also

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[1] Local 289, Graphic Communications International Union, AFL-CIO.

[2] Section 9(b) provides, in relevant part: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this

id. at A16. The Regional Director acknowledged that such a unit "departs from the traditional unit which includes preparatory employees" together with pressroom employees. *Id.* at A27. The Regional Director determined, however, that "the facts herein mandate such a departure." *Ibid.*

The Director found that petitioner's company is divided into five departments, each of which is staffed by employees within specific job classifications. The pressroom department consists of press operators, a pressman trainee, and "joggers"[3]; the pre-press department consists of cameramen, strippers, and platemakers; the composition department consists of a typesetter/layout employee and a dispatch/layout employee; the shipping and receiving department is manned by drivers and material handlers; and the maintenance department includes press mechanics, janitors, and an individual who constructs wooden pallets. Pet. App. A20-A21. Each department is located within a separate, well-defined area of the plant, and the pressroom is segregated from the rest of the facility by brick walls. *Id.* at A20.

Customers provide petitioner with a model of the advertising insert to be produced, which either specifies, or already has in place, the necessary art work and typesetting. Petitioner then sends the model to the composition department, where a "job ticket[]" is created that instructs other departments

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[Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

[3] A "jogger" conveys the printed product from the presses to pallets located in the pressroom, and cleans in and around the presses. Pet. App. A22.

respecting the requirements of the particular assignment, such as the number of copies and the size of the paper. Pet. App. A19-A20, A21. After consulting with the pre-press department about color and printing configurations, the composition department attaches the job ticket to the model and sends it to the cameramen in the pre-press department; a platemaker in the pre-press department makes a plate of the model which, along with the job ticket, is forwarded to the pressroom. *Id.* at A20, A21. The pressroom employees set up and run the presses and produce the copy. *Id.* at A23. Finally, the printed advertising copy is distributed to the customer by the shipping and receiving department in accordance with instructions on the job ticket. *Id.* at A20.

Petitioner's pressroom employees have and exercise job skills that are distinct from those of employees in other departments. Pet. App. A23. The press operators are highly skilled employees who perform traditional tasks unique to their job classification—they are responsible for setting up and performing minor maintenance on the presses, adjusting colors and paper tensions, aligning images, and controlling paper speed. *Ibid.* Approximately three years of training are required prior to becoming a press operator; petitioner treats operators with less experience as trainees, and the pressroom is the only department with a "trainee" classification. *Id.* at A23-A24. Petitioner maintains a manual of detailed technical information respecting the operation and maintenance of the presses, and the pressroom is the only department for which there is such a manual. *Id.* at A24.

Petitioner's pressroom employees have little contact with employees in other departments. Pet. App. A21-A22. Composition employees "have virtually no day-to-day contact with press employees"; their job tickets are forwarded with the work. *Id.* at A21. Contact between the pressroom and the pre-press department consists of the submission of plates by the platemaker to the pressroom. *Ibid.* Apart from brief visits by material handlers who deliver paper rolls and remove finished work, the pressroom has no contact with the shipping and receiving department, and, similarly, contact between the pressroom and maintenance department employees is brief and infrequent. *Id.* at A21-A22. In fact, pressroom employees are not permitted to enter certain areas of the plant, including the pre-press area, because they are often covered in ink; and other employees are forbidden to enter the press area. Gov't C.A. Br. 14-15; Pet. App. A25. With a minor exception, non-pressroom employees do not interchange job functions with pressroom employees. *Id.* at A25.[4]

The pressroom employees have supervision separate from that of other departments; there is no common supervision of departments except at the highest levels of management, which is not significant on a day-to-day basis. Pet. App. A22-A23. Employees in different departments have separate work schedules, with starting times staggered to correspond to the particular needs of each department, and

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[4] The minor exception occurs approximately four times per year, when petitioner temporarily assigns the maintenance department's pallet maker or another unskilled worker to fill in for the jogger who is absent or on vacation. Pet. App. A22, A25.

press operators are among petitioner's highest-paid employees. *Id.* at A24-A25.

Based on these findings and the record as a whole, the Regional Director determined that this case was not a traditional case such as *Moore Business Forms, Inc.*, 216 N.L.R.B. 833 (1975). The Director discussed the different facts which led the Board in *Moore* to approve a bargaining unit that contained both "preliminary" and pressroom employees.[5] The Director concluded that "[t]he differences between the fact situation therein and that which confronts us here are obvious and striking." Pet. App. A27. Accordingly, the Regional Director ordered an election in the unit consisting of petitioner's pressroom employees. *Id.* at A16-A17.

2. Petitioner filed a request for review of the Regional Director's decision with the Board. The Board denied petitioner's request, concluding that "the facts here warrant a departure from the traditional unit of lithographic production employees as there is insufficient evidence of cohesiveness between the preparatory employees and pressroom employees to warrant a broader unit." Pet. App. A13.[6] The

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[5] In *Moore Business Forms, Inc.*, preliminary and pressroom employees worked under common supervision; the press operators' duties included cutting and correcting plates, requiring frequent trips to the pre-press area; and pre-press employees were continually in the pressroom working on jobs and obtaining information for their work. Pet. App. A27; 216 N.L.R.B. at 834.

[6] Board Member Stephens would have granted petitioner's request for review "in order to read the record and determine the applicability of *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984)." Pet. App. A14.

Union won the representation election and was certified by the Board as the collective-bargaining representative of the employees in the unit. *Id.* at A7. Petitioner refused to bargain with the Union, however, and the NLRB General Counsel issued a complaint and notice of hearing alleging that petitioner had violated Section 8(a)(5) and (1) of the Act. *Id.* at A8. The Board granted the General Counsel's motion for summary judgment based on its finding that petitioner's refusal to bargain constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and entered an appropriate order. Pet. App. A6-A10.

3. The court of appeals enforced the Board's order in an unpublished opinion. Pet. App. A1-A4. The court concluded that the Board had not abused its discretion in deeming petitioner's pressroom employees an appropriate bargaining unit, because "[t]he record supports a finding of differences in working conditions sufficient to support a conclusion that the pressmen at the [c]ompany enjoy a distinct community of interests." *Id.* at A3. The court concluded that, based on all the facts in the case, there was "a sufficient 'community of interests' that justifies the choice of bargaining unit in this case." *Id.* at A4.

ARGUMENT

1. The court of appeals correctly found that the Board did not abuse its discretion in approving the bargaining unit of pressroom employees on the facts of this case. See Pet. App. A3-A4. The court of appeals, the Board, and the Regional Director explained the circumstances that support the determination of the bargaining unit. It is well settled that,

under Section 9(b) of the Act, "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.'" *South Prairie Construction Co.* v. *Local 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 491 (1947)). The Board's broad discretion in unit determinations "reflect[s] Congress' recognition 'of the need for flexibility in shaping the [bargaining] unit to the particular case.'" *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (quoting *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944)).[7] In defining bargaining units, the Board considers whether the group of employees at issue shares a "community of interest" apart from other employees, for "[a] cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." *Action Automotive, Inc.*, 469 U.S. at 494 (citations omitted). A variety of factors are relevant to that determination, including: "a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions * * *; infrequency or lack of contact with other employees; lack of integration with the work

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[7] Moreover, the Board need not determine "the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950), enforced, 190 F.2d 576 (7th Cir. 1951); accord *NLRB* v. *Fuelgas Co.*, 674 F.2d 529, 530 (6th Cir. 1982).

functions of other employees or interchange with them; and the history of bargaining." *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137-138 (1962); accord *NLRB* v. *American Seaway Foods, Inc.*, 702 F.2d 630, 633-634 (6th Cir. 1983).

Applying this test, the Regional Director concluded that, although pressroom and preparatory employees are generally deemed a "traditional unit" in a lithographic business, on the facts presented in this case, petitioner's pressroom employees, by themselves, constitute an appropriate bargaining unit because they share a community of interest separate and distinct from those of petitioner's other employees, including the preparatory employees. Pet. App. A27. As the Regional Director found, the pressroom employees have little day-to-day contact with employees in petitioner's other departments, are separately supervised, possess significantly greater training and skills, and do not interchange job functions with other employees. *Id.* at A21, A22-A23, A24-A25. The Board agreed that, on these facts, a departure from the traditional unit of lithographic production employees was justified, *id.* at A13, and the court of appeals correctly held that the Board did not abuse its discretion by so concluding. *Id.* at A3.

Contrary to petitioner's contention (Pet. 13-18), the Board's failure to include preparatory employees in the bargaining unit does not constitute an unexplained departure from a holding that bargaining units in the printing industry "must include at least those preparatory and press employees involved in the lithographic production process." Pet. 13. When the Board adopts a presumption governing bargaining unit determinations in a particular industry, it does

so explicitly. See, *e.g.*, *Haag Drug Co.*, 169 N.L.R.B. 877, 878 (1968) (rebuttable presumption that a single-store unit is appropriate in retail chain operations). The Board has not adopted such a rule for the printing or lithographic industry; rather, the Board's "traditional" practice of placing preparatory and pressroom employees in the same unit is based upon its experience that, in that industry, these employees generally have tended, as a factual matter, to share a community of interest. Where the facts in a given case demonstrate a different alignment of interests among employees, however, the Board appropriately tailors the unit to reflect that difference. See, *e.g.*, *Meredith Publishing Co.*, 140 N.L.R.B. 509, 511 (1963) (excluding paste-up employees from pressmen and preparatory unit because even though the paste-up employees clearly performed preparatory work, they were not part of the pressroom operations); cf. *NLRB* v. *American Printers & Lithographers*, 820 F.2d 878 (7th Cir. 1987) (approving addition of pressroom floor helpers of one employer to multi-employer pressroom unit and holding that other general pressroom employees could be added later if appropriate on an employer-by-employer basis).

The case quoted by petitioner (Pet. 13-14) did not hold that a bargaining unit including pressmen "must" also include preparatory employees. Rather, the court of appeals in *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087, 1092 (7th Cir. 1984), held that the Board had not provided sufficient explanation for why it did not include preparatory workers in the unit in light of the fact that traditionally they had been included. In discussing the inadequate explanation by the Board, the court also emphasized the fact that the

Regional Director in that case "had gone so far as to say that the Board has a long-established policy of recognizing pressmen as a separate unit." *Id.* at 1093. The court of appeals found that the longstanding policy was to the contrary and it remanded the case to the Board to explain its ruling. The court of appeals made clear that the Board could still reach the same conclusion on remand that the pressmen alone constituted an appropriate bargaining unit, but ordered that this time the Board had to "explain[] why." *Id.* at 1095.

The court of appeals below had no such trouble with the determination by the Board and the Regional Director in this case. The Regional Director expressly recognized that the "unit composition herein departs from the traditional unit," and he provided ample explanation to justify the departure. See Pet. App. A19-A27. The Board also acknowledged that the unit was a departure from the traditional unit, but it found the departure warranted. *Id.* at A13. This fact-bound determination does not merit review by this Court.

2. Petitioner contends (Pet. 19-26) that the decision below conflicts with the decision of the Seventh Circuit in *Continental Web Press, Inc.* v. *NLRB*, *supra*, because that court refused to countenance the Board's departure from the traditional lithographic production unit of preparatory and pressroom employees.[8] As explained above, however, the Seventh

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[8] Petitioner also asserts in passing (Pet. 19) that the Board's factual findings were "generally erroneous." Petitioner does not, however, urge this evidentiary issue as a separate basis for review by this Court, nor does it identify any record evidence even to suggest that the Board's findings were not supported

Circuit did not establish a per se rule as to how a bargaining unit in the printing industry must be defined. Moreover, under the Seventh Circuit's view, the Board was justified in finding that the pressroom employees here enjoyed a separate community of interest from the preparatory employees based on the record in this case.

In *Continental Web Press*, the Seventh Circuit observed that "[t]he greatest conflicts of interest among workers are over wages, fringe benefits, and working conditions." 742 F.2d at 1091. The court there concluded that "there do not seem to be any significant differences between the preparatory employees and the pressmen in [the company's] plant along any of these dimensions," and criticized the Board for breaking up this "homogeneous work force into separate units." *Ibid.* By contrast, in the instant case, the Board and the court of appeals found that there are significant differences between the pressroom employees and petitioner's other employees regarding these very factors.

The court of appeals upheld the Board's determination that there was a "difference in skills and working conditions," citing specifically the fact that the pressmen remain "trainees" until they have three years' experience, unlike the employees in all the other departments who do not go through a training period. The court of appeals found evidence of lack of "functional integration" due to the fact that the

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by substantial evidence. In any event, this case does not constitute "the rare instance when the standard appears to have been misapprehended or grossly misapplied," and therefore review by this Court is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

pressroom employees work in an area that is physically separated from the other employees at petitioner's plant. Pet. App. A3. The court pointed to the lack of significant interchange or transfer with employees of other departments at the company. The court of appeals also emphasized the fact that the pressroom employees "have separate supervision, may work a different schedule, wear distinctive uniforms, and are paid on a different scale." *Id.* at A4. These findings reveal that the Board's determination, upheld by the court of appeals, was properly based on significant differences between the pressroom and preparatory employees in petitioner's company that could create conflicts of interest in matters germane to collective bargaining. Further review of this intensely factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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